

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 99-75

November 23, 1999

TO: Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Richard A. Siegel
Associate General Counsel

SUBJECT: Lightening the Load – Alternative Investigative Techniques

When the Impact Analysis case prioritization system was introduced in 1995, one of the concepts introduced was the use of alternative investigative techniques to lighten the investigative workload in our Regional Offices. (See GC 95-15). In the face of significant budgetary constraints, in fiscal year 1998 we expanded the use of alternative investigative techniques in order to respond in a timely manner to the public. This was particularly true in high travel Regions as the budget simply did not provide for enough funds for investigative travel. When in a crisis mode, it is important to have these lightening-the-load tools available. As the crisis in the budget subsided in FY 1999, Regions were advised to once again engage in travel to conduct their investigations.

While there is no question that the alternative investigative techniques are time and resource savers, concerns have been raised about the appropriateness of using these techniques in cases which are complicated or which have a significant impact on the public. This issue was discussed in the workshops at the Regional Directors Conference and the consensus of those present was that the evidence obtained through a face-to-face affidavit tends to be more reliable than that obtained through questionnaires or telephonic affidavits. In addition, when affidavits are taken face to face, there is a more viable opportunity for a full discussion of the allegations, the context in which the alleged unfair labor practices arose and the situation at the workplace. Accordingly, a fuller investigation is conducted and the record upon which a decision is made is a more complete one. Accordingly the General Counsel has decided that, absent significant budgetary issues, there will be a presumption in favor of face-to-face affidavits in all Category II and III investigations in the future.¹ In situations where

¹ Examples of situations where the presumption can be rebutted would include: cases where there are no material issues of fact; cases where extensive travel is required and initial discussions with the charging party indicate that there is little likelihood of merit and supplemental affidavits.

substantial travel will be necessary, the Regional Directors may exercise their discretion to take telephonic affidavits in circumstances where the affidavit is a supplemental statement, where individuals are providing evidence that corroborates evidence presented² in a face-to-face affidavit or where there is a very high probability that the case has no merit.

In Category I cases where the issues are generally more straightforward, the use of telephonic affidavits generally should continue. The Regional Director may, however, exercise his or her discretion in evaluating whether special circumstances warrant the use of face-to-face affidavits in Category I cases. It is assumed that Regions assisting other Regions through the traditional interregional assistance program (as opposed to those assisting through the temporary geographic transfer of counties) would use telephonic affidavits. Similarly, a Region seeking assistance should be using lighten-the-load techniques in all Category I cases.

Questionnaires should be used as a helpful initial screening device or to assist in cases where a large number of people who have similar allegations need to be contacted, for instance in salting cases. In addition, questionnaires appropriately may be used in compliance matters. However, absent extraordinary circumstances, a case should never go to trial without sufficient sworn testimony received in affidavit form setting forth the evidence to support the complaint.

Finally, during the budgetary crisis, we were forced to discourage Regions from sending Board agents to meet with charged parties, unless the charged parties agreed to provide sworn statements. That practice ended in FY 1999 when the budget allowed for more travel. This is to reiterate, that absent significant budgetary constraints, in cases where the charging party has presented facts which point toward a prima facie case, and the charged party is willing to meet with us, ~~to~~ in most cases it would be appropriate for Board agents to travel to charged party offices and places of business to gather evidence in furtherance of the investigation ~~engage in a dialogue about the case~~, even in situations where they will not provide sworn statements.

/s/

R. A. S.

cc: NLRBU

² Although in the instance of corroborative affidavits, some Directors correctly noted that often the credibility of a corroborative witness is at least as important as that of a discriminatee. In this situation the decision whether a face-to-face affidavit should be taken should be carefully considered.

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